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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 RHONDA LEE FIRESTACK-
11 HARVEY (1),
MICHELLE LYNN GREGG (3), and
12 ROLLAND MARK GREGG (4),

13 Defendants.

NO: 2:13-CR-0024-TOR-1
2:13-CR-0024-TOR-3
2:13-CR-0024-TOR-4

ORDER DISMISSING
SUPERSEDING INDICTMENT
WITHOUT PREJUDICE

14 Before the Court is the Government's Motion to Dismiss the Superseding
15 Indictment against Defendants Rhonda Lee Firestack-Harvey, Michelle Lynn
16 Gregg, and Roland Mark Gregg, Without Prejudice. ECF No. 828. The
17 Government seeks to dismiss the superseding indictment against these Defendants
18 pursuant to Fed. R. Crim. P. 48(a). It explains that it "has decided not to prosecute
19 this case further at this time" without conceding "that the Department of Justice
20 was not authorized to spend money on this prosecution after December 2014."

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1 ECF No. 828 at 6-7. The Government explains that it “may re-assess prosecution
2 of Defendants . . . if Section 542 is invalidated by expiration or repeal.” *Id.* at 7.

3 Defendants have moved for vacatur of their convictions and then dismissal
4 of the underlying indictment with prejudice. ECF No. 829. Defendants explain
5 that vacatur of their convictions is a necessary predicate to the dismissal of the
6 indictment because judgments have already been entered. Additionally,
7 Defendants contend that the five year statute of limitations expired and that
8 jeopardy attached at the jury trial. Defendants reason that the expired statute of
9 limitations and the Double Jeopardy clause require that the dismissal be with
10 prejudice.

11 The Court has reviewed the motions and the file therein and is fully
12 informed. For good cause shown, the Court grants the motions in part, but makes
13 no judgment as to the merit or wisdom of this dismissal.

14 DISCUSSION

15 Rule 48 allows the Government to dismiss an indictment “with leave of
16 court.” Fed. R. Crim. P. 48(a); *United States v. Garcia–Valenzuela*, 232 F.3d
17 1003, 1007 (9th Cir. 2000). Leave of court is required “to provide a check on
18 prosecutorial behavior,” *United States v. Hayden*, 860 F.2d 1483, 1487 (9th Cir.
19 1988), by guarding against “prosecutorial harassment, e.g., charging, dismissing,
20 and recharging, when the Government moves to dismiss an indictment over the

1 defendant's objection." *Garcia-Valenzuela*, 232 F.3d at 1007–1008 (quoting
2 *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977) (per curiam). However, the
3 Court's supervisory role is limited and the motion should be granted if it is made in
4 good faith. *Hayden*, 860 F.2d at 1487; see also *United States v. Brown*, 425 F.3d
5 681, 682 (9th Cir. 2005) ("Dismissals by the government are generally presumed
6 to be without prejudice."). Conversely, courts should grant the motion with
7 prejudice if dismissal is sought "for an improper purpose, such as harassment of
8 the defendant." See 3B Charles Alan Wright, et al., *Federal Practice and Procedure*
9 § 801, 328–329 (4th ed. 2013).

10 Defendants were solely convicted of the lesser included offense charged
11 within Count 2 of the Superseding Indictment; manufacture of less than 100, but
12 more than 50 marijuana plants. The jury found Defendants not guilty of all other
13 charges in the Superseding Indictment. Consequently, those other counts are not at
14 issue and cannot be resurrected.

15 Manufacturing marijuana was illegal and remains illegal under federal law.
16 21 U.S.C. § 841(a)(1). After Defendants were charged with manufacturing
17 marijuana, Congress suspended the Department of Justice from spending its
18 appropriated funds toward certain prosecutions. See e.g., Consolidated and Further
19 Continuing Appropriations Act of 2015, Pub. L. No. 113-235, tit. V, div. B, § 538
20 (2014). As the Government recognizes, this suspension of funding continues to

1 this day. The Government seeks dismissal of the sole remaining charge while the
2 cloud of Congress' suspension of funding persists. If that suspension were to
3 expire or be repealed, the Government could seek to enforce what has always been
4 illegal under federal law.

5 Defendants contend the Government could not re-charge them because the
6 statute of limitations has expired. Defendants are mistaken. If an indictment is
7 "dismissed *for any reason*" the period of limitations is also extended for a set
8 period of time as specified in 18 U.S.C. § 3288 (emphasis added). That period of
9 time is measured and begins to accrue when the indictment is dismissed, not when
10 the crime was committed.

11 It remains to be seen whether Congress will continue its fiscal suspension of
12 certain marijuana prosecutions. The decision whether or not the Government
13 could legally (or would) re-charge Defendants is best left for the day when that
14 possibility occurs.

15 **Accordingly, IT IS HEREBY ORDERED:**

- 16 1. The Government's Motion to Dismiss the Superseding Indictment against
17 Defendants Rhonda Lee Firestack-Harvey, Michelle Lynn Gregg, and
18 Roland Mark Gregg, Without Prejudice (ECF No. 828) is **GRANTED**.

- 1 2. Defendants' Motion to Dismiss with Prejudice and Motion to Vacate the
2 Judgment[s] of Conviction (ECF No. 829) and Motion to Expedite (ECF
3 No. 830) are **DENIED** in part and **GRANTED** in part.
- 4 3. The Judgments against Defendants Rhonda Lee Firestack-Harvey (ECF
5 No. 782), Michelle Lynn Gregg (ECF No. 784), and Roland Mark Gregg
6 (ECF No. 786) are **VACATED**.
- 7 4. Count 2 of the Superseding Indictment against Defendants Rhonda Lee
8 Firestack-Harvey, Michelle Lynn Gregg, and Roland Mark Gregg (ECF
9 No. 322) is **DISMISSED** without prejudice. The jury's verdict of Not
10 Guilty as to all remaining counts of the Superseding Indictment stands.
- 11 5. The District Court Executive is hereby directed to enter this Order and
12 provide copies to counsel, the U.S. Probation Office, and the U.S.
13 Marshal's Service.

14 **DATED** January 3, 2018.



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Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge